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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 430

HORACE BANTA, Trustee of the Property of THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

*v.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

## JURISDICTIONAL STATEMENT

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# Supreme Court of the United States

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HORACE BANTA, Trustee of the Property of the THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Appellant,

*v.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

## Jurisdictional Statement

Appellant appeals from the decision and order of the United States District Court for the District of New Jersey entered on May 13, 1957 dismissing the complaint which sought an order or decree enjoining and setting aside an order of the Interstate Commerce Commission and directing the Commission to grant affirmative relief to appellant. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## Opinion Below

The opinion of the District Court for the District of New Jersey is not yet officially reported. A copy of said opinion and the order of said District Court are attached hereto as Appendix "A". The report of the Interstate Commerce Commission is reported in 299 I.C.C. 41 (1956). A copy of said report and the order of the Commission are attached hereto as Appendix "B."

## Jurisdiction

This suit was brought under 28 U.S.C. §§1336, 1398, 2284, 2321-25 and 5 U.S.C. § 1009. The decision and order of the District Court was entered on May 13, 1957, and notice of appeal was filed in that court on July 10, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Radio Corporation of America* v. *United States*, 341 U. S. 412 (1951).

## Questions Presented

1. Does the Interstate Commerce Commission have jurisdiction under Section 13(3) and (4) of the Interstate Commerce Act to order the discontinuance of the operation of an intrastate passenger train required by a state when such operation causes undue, unreasonable or unjust discrimination against interstate commerce or causes undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other?

2. Are unreasonable discriminations against interstate commerce caused by the state-required operation of a passenger train intrastate unlawful under Section 3(1) of the Interstate Commerce Act?

3. Did the Interstate Commerce Commission err in concluding (without disapproval on the part of the District Court) that unreasonable preferences, advantages, prejudices and disadvantages do not violate Section 3(1) of the Interstate Commerce Act unless they are personal and local in nature?

4. If the answer to question 3 is "no," did the Interstate Commerce Commission err in concluding (with the approval of the District Court) that the evidence presented by plaintiff (appellant) did not establish the existence of unreasonable preferences, advantages, prejudices and disadvantages which are personal and local in nature in the instant case?

## Statutes Involved

Set forth in Appendix "C" hereto are Section 3(1) and Section 13(3) and (4) of the Interstate Commerce Act [49 U.S.C. § 3(1), 24 Stat. 380 as amended in 54 Stat. 902; and 49 U.S.C. § 13(3) and (4), 24 Stat. 383 as amended in 36 Stat. 550, 41 Stat. 484, 49 Stat. 543 and 54 Stat. 910].

## Statement

Appellant operates freight and passenger service between points in the states of New Jersey and New York. In 1952 the Board of Public Utility Commissioners of the State of New Jersey denied appellant permission to discontinue the operation intrastate within the State of New Jersey of one of appellant's passener trains.* An appeal

*There was no obstacle to the discontinuance of the interstate services of said train since the Interstate Commerce Commission has held that it is without authority to prohibit discontinuance of anything less than total service on a line or portion of a line. *Kansas City Southern R. Co.*, 94 I.C.C. 691 (1925); *New York Central R. Co.*, 254 I.C.C. 745, 765 (1944). Since the State of New York did not seek to prohibit same, there was no obstacle to the discontinuance of the train's services intrastate within the State of New York.

to the courts of the State of New Jersey on the ground that said denial deprived appellant of its property in violation of the due process provisions of the Fourteenth Amendment of the United States Constitution resulted in an affirmance of said denial, 23 N. J. Super. 1, 92 A. 2d 515 (1952), and 12 N. J. 281, 96 A. 2d 526 (1953). An appeal to this Court was dismissed for want of a substantial federal question, 346 U. S. 868 (1953).

Thereafter, on February 8, 1954, appellant applied to the Interstate Commerce Commission requesting it to find that the required continuance of said train's operation intrastate within the State of New Jersey places an undue burden upon and unjustly discriminates against interstate commerce and causes unreasonable advantage, preference or prejudice as between interstate and intrastate commerce and to issue an order directing the removal thereof by permitting the discontinuance of the operation of said train within the State of New Jersey. In thus applying to the Interstate Commerce Commission, appellant raised the question of the lawfulness of the impact on interstate commerce caused by the State Board's order under Sections 3(1) and 13(3) and (4) of the Interstate Commerce Act in the manner indicated proper by this court in *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 346, n. 9 (1951). In said case, where a state Board's order refusing permission to discontinue certain passenger trains was under attack as violative of the due process provisions of the Fourteenth Amendment, this Court stated that it could not consider any impact said order might have on interstate commerce because the jurisdiction of the Interstate Commerce Commission had not been invoked for decision under Section 13(4) of the Interstate Commerce Act as to whether the continuance of said intrastate service constituted an undue discrimination against interstate commerce.

After first summarily rejecting appellant's application, on reconsideration the Commission instituted proceedings

and held hearings at which these facts were established and are not disputed: appellant is the trustee of a railroad which has been in reorganization pursuant to Section 77 of the Bankruptcy Act since June 30, 1938 and whose overall operations are being conducted at a financial loss; said railroad operates in the states of New Jersey and New York and its entire weekday passenger service consists of six evening trains operating westbound from Jersey City, N. J., to Spring Valley, N. Y., and five morning trains operating eastbound from Spring Valley, N. Y. to Jersey City, N. J., despite the fact that the total number of passengers carried westbound in the evening is less than the total number of passengers carried eastbound in the morning; the train sought to be discontinued (known as "train 613") is one of the westbound evening trains and its discontinuance would leave an equal number of trains operating in each direction, thereby eliminating the necessity for having an unscheduled train without passengers move eastbound daily in order to equalize equipment; said train carries a daily average of 162 passengers, of whom 33 are non-revenue and 36 are intrastate passengers; said train is operated at an annual out-of-pocket cost of $50,000 and an annual out-of-pocket loss of $30,000 which the Commission found "contributes to the substantial recurring passenger deficits and to the net losses from respondent's [appellant's] operations as a whole" (Appendix B, p. 31).

Following the establishment of such undisputed facts, the Commission issued a report and order (Appendix B) dismissing said proceedings on the ground that (1) under Section 13(3) and (4) of the Interstate Commerce Act it had no jurisdiction to remove unjust discriminations against interstate commerce caused by the state-required operation of passenger trains intrastate, (2) under Section 3(1) of said Act unreasonable discriminations against interstate commerce caused by the state-required operation of a passenger train were not unlawful, (3) under Section

3(1) of said Act unreasonable preferences, advantages prejudices and disadvantages are not unlawful unless they are personal and local in nature, and (4) appellant had not proved the existence of unreasonable preferences, advantages, prejudices and disadvantages which were personal and local in nature.

Appellant thereupon brought this action in the District Court for the District of New Jersey (three-judge court) for an order or decree setting aside and enjoining the said report and order of the Commission and directing the Commission to take jurisdiction and grant the relief prayed for under Section 13(3) and (4) of the Interstate Commerce Act and to grant affirmative relief under Section 3(1) of the Interstate Commerce Act. Said court upheld the determination of the Commission and dismissed appellant's complaint.

## The Questions Are Substantial

The question as to whether the Interstate Commerce Commission has jurisdiction to remove unreasonable discriminations against interstate commerce caused by State required operation of intrastate trains raises an issue which is important to the administration of the Interstate Commerce Act. It is an issue which affects every common carrier in the nation and is, therefore, of importance to the transportation industry as a whole.

Since such issue involves the interpretation of federal statutes [Section 3(1) and Section 13(3) and (4) of the Interstate Commerce Act] which are of importance to the transportation industry, and, by consequence, to the nation as a whole, it is important that an accurate interpretation of such statutes be established. Yet the interpretation placed upon such statutes by the Commission, with the approval of the District Court, conflicts directly with this Court's interpretation as set forth in *Alabama Public*

*Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 346, n. 9 (1951), and *Houston, East & West Texas Ry. Co.* v. *United States* (the Shreveport case), 234 U. S. 342 (1914).

During the past several years, Congressional bills have been introduced aimed at expressly giving the Commission the jurisdiction which appellant herein claims the Commission already has and they have failed of enactment. (See, for example, S. 281, 83d Cong.) The fact that such bills were introduced attests to the broad application and importance of the issue here presented. At the same time, as this Court has held, the failure of enactment of bills seeking to grant particular jurisdiction is not significant in interpreting language in an existing statute which is broad enough to grant said jurisdiction. *Helvering* v. *Clifford*, 309 U. S. 331, 337 (1940); *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533, 559-561 (1944).*

**Question 1.** The refusal to hold that the Commission has jurisdiction under Section 13(3) and (4) of the Interstate Commerce Act to remove discriminations against interstate commerce caused by the required operation of intrastate trains is in direct conflict with the statement of this Court in *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 346, n. 9 (1951), that it could not look into the question of impact on interstate

* Since the enactment of the statutes involved, there has been no administrative decision, prior to the decision here under review, as to whether said statutes grant the jurisdiction in question. Such administrative inaction has arisen from a lack of attempt by railroads to invoke such jurisdiction and has led to an assumption of lack of jurisdiction. But as this Court has recently pointed out, an administrative agency's failure to act is not a binding administrative interpretation that Congress did not intend to give it jurisdiction. *U. S.* v. *E. I. Dupont de Nemours & Co.*, 353 U. S. 586, 1 L. Ed. 2d 1057 (1957). This is particularly true where there has been no previous positive administrative decision. *Baltimore & O. R. Co.* v. *Jackson*, 353 U. S. 325, 1 L. Ed. 2d 862 (1957).

commerce caused by a state board's order requiring intrastate train service to be continued because the Commission's jurisdiction had not theretofore been invoked under Section 13(4). This Court thus indicated that the failure previously to invoke the Commission's jurisdiction prevented this Court from looking into the question of such impact. The Commission's present holding—that it has no jurisdiction which could previously have been invoked—is, therefore, a finding that the requirement which this Court specified had to be satisfied before it could look into the question of such impact on interstate commerce is incapable of ever being satisfied. The result is that, absent further legislation, there is in existence today no federal jurisdiction anywhere capable of preventing, on grounds of discrimination against interstate commerce, a state from requiring an interstate railroad to operate any number of unprofitable and needless intrastate trains—and this jurisdiction is lacking even though such operation may burden interstate commerce to the highest conceivable degree and even to the point of completely exhausting revenues derived from interstate services.

The refusal to hold that the Commission has such jurisdiction also conflicts with the holding of this Court in *Houston, East & West Texas Ry. Co.* v. *United States* (the Shreveport case), 234 U. S. 342 (1914), when read in the light of the history leading to the enactment of Section 13(3) and (4) following said decision. Such decision involved Section 3(1) of the Interstate Commerce Act which declares certain preferences and prejudices to be unlawful. This Court rejected an interpretation of Section 3(1) which would have severely limited what said section condemns and stated that said section declares unlawful "all discriminations of the sort described which it was within the power of Congress to condemn" and "any discriminatory action or practice of interstate carriers affecting interstate commerce which it [Congress] had authority to reach." Section 13(3) and (4) was enacted six years

later for the purpose of implementing procedurally the declaration of Section 3(1) as to what was unlawful by prescribing what the Commission might do to remove such unlawfulness.* In enacting said section, Congress did not merely repeat the language of Section 3(1) which was in terms of preferences and prejudices but added the clarifying language of the *Shreveport* decision, namely "any undue, unreasonable or unjust discrimination against interstate commerce," thus eliminating the need for litigation such as that culminating in the *Shreveport* decision with respect to Section 3(1), by making clear from the outset that all unreasonable discriminations were outlawed. The enactment of such procedural section has been recognized universally as embodying the doctrine of the *Shreveport* decision. H. R. Rep. No. 456, 66th Cong., 1st Sess. 20; *Board* v. *Great Northern Ry.*, 281 U. S. 412, 426 (1930); *State of Illinois* v. *United States*, 101 F. Supp. 36, 39 (N. D. Ill. 1951), aff'd, 342 U. S. 930 (1952); *In re Intrastate Rates Within Illinois*, 59 I.C.C. 350, 361, 362 (1920).

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* The Commission's order which was upheld in the *Shreveport* case had directed certain carriers to cease charging higher interstate than intrastate rates, but it did not attempt to prescribe what intrastate rates should be charged. The carriers could have complied with the Commission's order either by lowering the interstate rates or by raising the intrastate rates. If the carriers chose to comply by raising the intrastate rates, there remained the procedural problem of whether they should apply to the courts for relief against the state order fixing such rates, or whether they could raise said intrastate rates and rely on the Commission's order as a defense to any prosecution under state laws. Thus while the *Shreveport* decision clarified the substantive content of Section 3(1), it soon became clear that the section was deficient in procedural implementation for its substantive provisions. It was in this context that Congress added Section 13(3) and (4) to the Act. In other words, rate discrimination was only one of the discriminations condemned by Section 3(1) and was the discrimination involved in the *Shreveport* case which first pointed up the procedural deficiency of such section and disclosed the need for the adoption of Section 13(3) and (4).

In the instant case, the Commission has, nevertheless, decided that there are certain discriminations which are lawful and may not be removed under the procedural provisions of Section 13(3) and (4) no matter how unreasonably they burden interstate commerce. It has rejected appellant's contention that the above history of Section 13(3) and (4) indicates that its coverage is as broad as that of Section 3(1) which this Court interpreted as extending to "any discriminatory action or practice of interstate carriers affecting interstate commerce which it [Congress] had authority to reach". The District Court's only answer to this contention is that in enacting Section 13(3) and (4) "the attention of Congress was upon rates and rate discrimination and that it was following up the decision in the *Shreveport* rate case" (Appendix A, p. 23). But the fact that the need for procedural implementation of the substantive provisions of Section 3(1) first became apparent with respect to rate discriminations does not even remotely suggest that Congress would confine its procedural implementation to such discriminations. Since the Supreme Court had just said that the provisions of Section 3(1) were so broad that they included *even rate discriminations* and had rejected a contention that Section 3(1) was not broad enough to cover such discriminations, in enacting implementing provisions it was logical to assume that Congress would make those provisions broad enough to include *even rate discriminations* in addition to the other discriminations admittedly covered by Section 3(1).

Finally, the refusal to hold that the Commission has such jurisdiction conflicts with the plain language of Section 3(3) and (4) and particularly when such language is read in conjunction with the Congressional use of the same or similar language elsewhere in the Interstate Commerce Act—a use which the Commission misinterpreted. Section 13(3) and (4) speaks of discrimination against interstate commerce caused by "any rate,

fare, charge, classification, regulation or practice." The Commission stated that an examination of the use of the same or similar series of terms in other sections of the Interstate Commerce Act leads to the conclusion that a word like "practice" must be interpreted as having the same meaning as the preceding words of said series and as not having any meaning which is unrelated to such preceding words. The Commission argued, in other words, that the series of terms "any rate, fare, charge, classification, regulation or practice" is to be interpreted as if it read "any rate, fare, charge, classification, regulation or practice *affecting any rate, fare, charge, classification or regulation,*" and it concluded that the only discriminations covered by Section 13(3) and (4) are discriminations as to rates or fares.

Contrary to the Commission's contention, an examination of the use of the word "practice" in the same or similar series of terms in other sections of the Act leads to an entirely different conclusion. Thus, the term "regulation or practice" as used in Section 15(7) is expressly qualified by the phrase "affecting any rate or charge" indicating that when Congress intended to limit the word "practice" to matters pertaining to rates, it plainly so stated even though the word "rates" was one of the preceding words in the series.

Even more convincing is an examination of the use of the series of terms in Section 15(1), which has contained the same series of terms since the enactment of the Mann-Elkins Act Amendment of 1910. Prior to such amendment, instead of containing simply the words "regulation" and "practice" as part of this series; said words were modified as follows:

> "• • • or any regulation, or practices whatsoever of such carrier or carriers *affecting such rates* • • •."
> (Emphasis supplied.)

The House report regarding the amendment stated (H. R. Rep. No. 923, 61st Cong., 2nd Sess. 10-11):

> "Under the section [amendment eliminating phrase 'affecting ~~such rates'] as reported, the commission~~ is given jurisdiction to enter orders not only in regard to rates, but also in regard to classifications, regulations, or practices, *whether they affect rates or not,* and to determine what are proper classifications, regulations, and practices, *in addition to* rates, • • •." (Emphasis supplied.)

As Section 15 exists today, therefore, Congress in some places, *e.g.,* in Section 15(7), has specifically limited the word "practice" by express language so that it relates only to rates and fares, and in other places, *e.g.,* in Section 15(1), it has eliminated such qualification for the express and stated purpose of giving the word "practice" extremely broad meaning and making it applicable to matters "in addition to rates" and "whether they affect rates or not."

The conflict between the Commission's refusal to hold that it has jurisdiction and the plain language of the statute is even more apparent from the difficulty which the Commission had in avoiding the obvious meaning of the word "regulation" as used in such series of terms. The Commission stated:

> "The running of a particular passenger train with a published statement of points served and the time of arrival and departure *is subject to transportation regulations,* but is not itself a regulation within the meaning of that term as used in the Act." (Emphasis supplied.)

It is not and never has been appellant's contention that the running of a train is itself a regulation. The situation with respect to the running of a train is analogous to

that with respect to the riding of a passenger. The riding of a passenger is not itself a regulation but is subject to regulation, and regulations relating to passengers are regulations within the meaning of that term as used in the Act (*e.g.*, segregation). By its admission that the running of a train is subject to regulation, the Commission has, in effect, admitted that a regulation with respect to the running of a train (*e.g.*, whether or when it should run) is also a regulation within the meaning of such term.

**Questions 2 and 3.** Appellant contended before the Commission that, if Section 13(3) and (4) is not broad enough to give jurisdiction to grant the relief sought, certainly such jurisdiction was given by Section 3(1) of the Act. In rejecting this contention, the Commission held that under Section 3(1) unreasonable discrimination against interstate commerce, in the absence of discrimination against specific persons and localities, is not unlawful. This amazing holding appears from the Commission's statement (Appendix B, p. 41) that it could find no prejudice to the interstate *passengers* or to the *localities* served by the train in question and that "in so far as respondent's [appellant's] theory rests upon the threat to interstate passengers and shippers of increased rates and fares required by the dissipation of respondent's [appellant's] revenues by State-required running of alleged needless passenger trains, it goes *beyond the purview of personal or local prejudice*" (emphasis added). In other words, the Commission concluded that, apart from discriminations which are personal and local, no amount of unreasonable discrimination against interstate commerce is unlawful under Section 3(1).

This holding conflicts directly with the *Shreveport* decision, *Houston, E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342 (1914) (discussed *supra*, pp. 8-10) wherein this Court stated with respect to Section 3(1) that "there is

no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach"—a statement which this Court has since repeated, *Mitchell* v. *United States*, 313 U. S. 80, 94 (1941). Such holding conflicts also with the plain language of Section 3(1) which declares unlawful (among other things) any unreasonable preference or prejudice to "any particular description of traffic". Certainly the interstate traffic of a railroad is a particular description of traffic.

In so far as the District Court's decision is concerned, it is not easy to determine just what consideration it gave to appellant's contention that under Section 3(1) all unreasonable discriminations against interstate commerce, and not merely those against individuals or localities, are unlawful. It is not clear if it considered whether discriminations which go beyond the purview of personal or local prejudice are lawful under Section 3(1). At first it stated (Appendix A, p. 25): "'We cannot see how * * * [the State Board's] action * * * discriminates against anyone." At this point, the District Court was obviously confining its consideration to the question of discrimination against individuals. A little later, it stated (Appendix A, pp. 25-26):

> "As for the rest, we do not see any discrimination resulting from the New Jersey court action. It may create a tough situation for the receiver of a financially embarrassed railroad but the appeal from New Jersey Supreme Court's action was dismissed because a federal question was thought to be lacking. That disposes of any legal or constitutional question resulting from the train's continued operation."

At this point, the District Court may have had in mind discrimination against interstate commerce other than discrimination against persons or localities (*i. e.*, discrimina-

tion which goes beyond the purview of personal and local prejudice). However, it seems to have by-passed the question of whether such discrimination is or can be unlawful under Section 3(1) by concluding either (a) that such discrimination does not exist in the instant case because this Court made a holding that such discrimination was non-existent when it dismissed the appeal from the New Jersey court decision above referred to (*supra*, p. 4), or (b) that the operation of trains intrastate cannot in any event cause such discrimination regardless of the financial burden it places on an interstate carrier, or (c) that the operation of the particular train involved in this case does not in fact cause such discrimination.

(a) If the District Court's conclusion was that such discrimination does not exist in the instant case because this Court made a holding to that effect when it dismissed the appeal from the New Jersey court decision above referred to, such conclusion overlooks the fact that the issue on that appeal was whether the continued operation of the train in question deprived the railroad of its property without due process of law in violation of the Fourteenth Amendment (see *supra*, pp. 3-4), and that no question of discrimination against interstate commerce was involved therein. Furthermore, under this Court's ruling in *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 346, n. 9 (1951), such question could not have been involved in the absence of prior application to the Commission under Section 13(3) and (4) (see discussion *supra*, pp. 7-8).

(b) If the District Court's conclusion was that the operation of trains intrastate cannot cause discrimination against interstate commerce which goes beyond the purview of personal or local prejudice, it is in direct and violent conflict with the decision in *Colorado* v. *United States*, 271 U. S. 153, 163 (1926), wherein this Court out-

lined very specifically how expenditures from the common resources in the local interest may discriminate against interstate commerce and stated: "Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in interstate commerce at a large loss," thus leaving no doubt that expenditures from the common resources in the operation of an intrastate service may cause unreasonable discrimination against interstate commerce which goes beyond the purview of personal and local prejudice.

(c) If the District Court's conclusion was that the operation of the particular train involved in this case does not in fact cause such discrimination, then the District Court undertook in the first instance to decide the question of fact which the Commission did not decide because of its holding that discrimination which "goes beyond the purview of personal or local prejudice" is lawful under Section 3(1). If the District Court did so, it acted in violation of the well-established principle giving the Commission primary jurisdiction thereof. *Texas & Pac. Ry. Co.* v. *Interstate Com. Com.*, 162 U. S. 197, 238 (1895); *Federal Trade Comm.* v. *Milling Co.*, 288 U. S. 212, 217-218 (1932).

The issue presented for decision is whether unreasonable discrimination against interstate commerce which goes beyond the purview of personal or local prejudice is unlawful under Section 3(1). The Commission held that such discrimination is not unlawful and the District Court failed to pass upon the issue. If it is unlawful, the matter should have been remitted to the Commission for the exercise of its expertise in determining the factual question of whether such discrimination exists in the instant case.

**Question 4.** After holding (in direct contradiction to this Court's *Shreveport* decision) that, except for discrimination against persons and localities, unreasonable dis-

criminations against interstate commerce are lawful under Section 3(1), the Commission concluded that it could find no discrimination against any persons or localities in this case. In so doing, it gave no indication that it considered—or that it was ever aware of—the fact that the order requiring the train's continued operation intrastate assures its intrastate riders of the availability of said train's intrastate service while, in view of the lack of any legal obstacle to the discontinuance of its interstate service (see footnote, *supra*, p. 3), its interstate riders are prejudiced by having no assurance of availability of interstate service.

The District Court did not deny the existence of this prejudice, but stated that the lack of assurance to interstate passengers as to "what probably will never come to pass" is not the type of discrimination that needs court action to stop it (Appendix A, p. 25). In so holding, the District Court not only assumed to usurp the Commission's expertise functions but it spoke in direct conflict with the Commission's statement in *Northeast Kentucky Coal Bureau* v. *Chesapeake & Ohio Ry. Co.*, 206 I.C.C. 445, 448, which was affirmed in 11 F. Supp. 588 (S. D. W. Va. 1935) and by this Court in 296 U. S. 187 (1935), namely:

> "Even though complainant's members may not be injured, their competitors are preferred. Preference, not necessarily injurious in itself, affords opportunity to gain success over and injure the other party. The act is specifically directed against undue preference and all other forms of unjust treatment of the shipping public."

In the exercise of its expertise functions, therefore, the Commission has heretofore held, with the approval of this Court, that prejudice in the form of potential injury is as much condemned by Section 3(1) as that which inflicts a present injury. In the instant case, the Commission did

not consider whether the potential injury to interstate passengers inflicted by the State-required operation of a train intrastate subjects such passengers to unreasonable prejudice. Therefore, even if Section 3(1) has the limited meaning ascribed to it below, the District Court should have remitted the matter to the Commission for the exercise of its primary jurisdiction to determine whether such potential injury to the interstate passengers subjects them to unreasonable and unlawful prejudice. The District Court's determination of such question in the first instance was in violation of the principle discussed *supra* (p. 16) and set forth in *Texas & Pac. Ry. Co.* v. *Interstate Com. Com.*, 162 U. S. 197, 238 (1895); *Federal Trade Com.* v. *Milling Co.*, 288 U. S. 212, 217-218 (1932).

## CONCLUSION

**The questions presented are substantial and of public importance.**

Respectfully submitted,

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## Appendix "A".

### Opinion of the United States District Court For the District of New Jersey.

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

CIVIL ACTION No. 878-56.

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HORACE BANTA, Trustee of the Property of the THE NEW JERSEY AND NEW YORK RAILROAD COMPANY,

Plaintiff,

*v.*

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

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Before: GOODRICH, *Circuit Judge*, and SMITH and MEANEY, *District Judges.*

OPINION

GOODRICH, *Circuit Judge:*

The plaintiff brings this action for a decree "suspending, enjoining, annulling and setting * * * aside" an order of the Interstate Commerce Commission and for an order directing the Commission to grant affirmative relief. It is an appeal from a Commission order to a three-judge district court pursuant to 28 U.S.C. §§ 1336, 2284 and 2321-2325.

The factual story is short and undisputed. Plaintiff is trustee of The New Jersey and New York Railroad Com-

pany which has been in a Section 77 reorganization proceeding, 11 U.S.C.A. § 205, since June 30, 1938, and is still there. Its overall operations are being conducted at a financial loss. The plaintiff, as trustee, wishes to discontinue one weekday passenger train called Number 613. This train operates westbound from Jersey City, N. J., to Spring Valley, N. Y. A daily average of customers on 613 is 162 passengers of whom 33 are nonrevenue and 36 are intrastate passengers. The trustee desires to add some coaches to another train which leaves Jersey City a little later in the afternoon than Train 613 thus, he says, adequately caring for the service now provided and saving the money-losing railroad something more than $30,000 a year.

Plaintiff first went to the Board of Public Utility Commissioners of New Jersey and made application to discontinue the operation of this Train 613 within the State of New Jersey. The New Jersey Board denied the application. This denial was affirmed by the appellate division of the Superior Court of New Jersey. *In re New Jersey & N.Y.R. Co.*, 23 N. J. Super, 1, 92 A. 2d 515 (1952). The Supreme Court of New Jersey affirmed the Superior Court. 12 N. J. 281, 96 A. 2d 526 (1953). The Supreme Court of the United States dismissed the appeal from the Supreme Court of New Jersey for want of a substantial federal question. *New Jersey & N.Y.R. Co.* v. *Board of Pub. Util. Comm'rs*, 346 U. S. 868 (1953).

Next the plaintiff went to the Interstate Commerce Commission for help and met with the same lack of success that he had before the New Jersey Board and the New Jersey courts, 299 I.C.C. 41 (1956). He then came to this Court. We are not going to help him either but in deciding so are moved to say that plaintiff has made a very able argument and got all there is to be had from a difficult case.

It is agreed between the parties that the Interstate Commerce Commission has no authority to allow a railroad to

discontinue an individual interstate train. *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939). So the plaintiff is compelled to proceed indirectly, pressing the novel contention that the Interstate Commerce Act is violated by the state-required operation of this particular train.

The plaintiff first turns to Section 13(3) and (4) of the statute. Here they are:

§ 13(3) "Investigation involving State regulations; conference of State and interstate commissions.

"Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

§ 13(4) "Duty of Commission where State regulations result in discrimination.

"Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." 49 U.S.C.A. § 13(3) & (4).

The Commission says that this section does not give it jurisdiction in such a case as this. Plaintiff says that is incorrect and says that the Supreme Court of the United States so held in *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U. S. 341 (1951). In that case a three-judge federal district court had enjoined enforcement of an order of the Alabama Public Service Commission. There had been no appeal to the state courts from that commission's order. In the course of the discussion in footnote 9 on pages 346-347 Mr. Chief Justice Vinson, who wrote the opinion for the Court, said:

"9. As the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 13(4) has not been in-

> voked for decision as to whether the continuance of this intrastate service constitutes an undue discrimination against interstate commerce, we cannot, in this proceeding, consider any impact the order of the Alabama Public Service Commission might have on interstate commerce. *Western & Atlantic R. Co.* v. *Georgia Pub. Serv. Comm'n*, 267 U. S. 493 (1925), and cases cited therein."

We think the reliance by the plaintiff upon this footnote is misplaced. The issue before the Court was not the jurisdiction of the Interstate Commerce Commission but the propriety of exercise of authority by a federal court enjoining enforcement of a state regulatory order. The cases cited in the footnote are instances where the Commission admittedly had jurisdiction.

Nor do we find in the plaintiff's recital of legislative history anything to bolster his case. Indeed, the legislative history cited by the Interstate Commerce Commission shows pretty clearly, we think, that the attention of the Congress was upon rates and rate discrimination and that it was following up the decision in the *Shreveport* rate case, (*Houston, E. & W.T. Ry.* v. *United States*, 234 U. S. 342 (1914)), which had been decided not long before. For a summary of legislative history of Section 13(3) and (4) see *Missouri P.R. Co.* v. *Norwood*, 42 F. 2d 765 (W. D. Ark. 1930), aff'd 283 U. S. 249 (1931), 290 U. S. 600 (1933).

The plaintiff's argument really gets down to an insistence that the running or nonrunning of this train is a "regulation" or "practice" "made or imposed by the authority of any State." The Supreme Court has warned us about the word "practice" as used in this Act:

> "The word 'practice,' considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so

widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it." *Baltimore & O. R.R.* v. *United States,* 277 U. S. 291, 299-300 (1928).

We think that if the paragraphs set out above are read in all their language, without pulling words out of context, the Commission was right in saying that Section 13 gave it no authority to do what the plaintiff asks.

The conclusion is fortified by some applications of the legislative language by the courts. Thus it has been held that a state imposed full crew requirement was not a "regulation" or "practice" within § 13(3) and (4). *Missouri P.R.R.* v. *Norwood,* 283 U. S. 249 (1931), aff'd, 290 U. S. 600 (1933), affirming, 42 F. 2d 765 (W. D. Ark. 1930). Likewise, state demurrage charges were held matters of "car service" not within the scope of § 13. *Chicago, M. St. P. & P.R. Co.* v. *McCree & Co.,* 91 F. Supp. 57 (D. Minn. 1950). *Cf. Railroad Commission* v. *Chicago, B. & Q. R.R.,* 257 U. S. 563, 584-87 (1922).

Plaintiff also pins some hope on Section 3(1) of the Interstate Commerce Act. This section provides as follows:

§ 3(1) "Undue preferences or prejudices prohibited.

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or

unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 49 U.S.C.A. §3(1).

The reports are full of statements to the effect that this section is to prevent discrimination[1] and in the *Shreveport* rate case (234 U. S. at 356), the language was very broad. We cannot see how the action of the New Jersey Board of Public Utility Commissioners, affirmed by that state's courts, in refusing to allow the railroad to give up the train in question discriminates against anyone. As the Interstate Commerce Commission said, "The interstate passengers and localities served by the train would seem to be benefitted by the board's order." 299 I.C.C. at 49. The plaintiff suggests an injury or prejudice to the interstate riders of Train 613 because those riders are not assured of continuous service, since the railroad may abandon an interstate train, while the intrastate riders are assured of continuous service under the New Jersey Board's order. We do not think this fear of what probably will never come to pass is sufficient to describe the type of discrimination that needs court action to stop it.

As for the rest, we do not see any discrimination resulting from the New Jersey court action. It may create a tough situation for the receiver of a financially embarrassed railroad but the appeal from New Jersey Supreme Court's action was dismissed because a federal question was thought to be lacking. That disposes of any legal or

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[1] *E.g. Dixie Carriers, Inc.* v. *United States,* 351 U. S. 56, 60 (1956); *United States* v. *Baltimore & O. R.R.,* 333 U. S. 169, 175 (1948); *New York* v. *United States,* 331 U. S. 284, 296 (1947); *Mitchell* v. *United States,* 313 U. S. 80, 94-95 (1941); *Merchants Warehouse Co.* v. *United States,* 283 U. S. 501, 512-513 (1931); and *Louisville, & N. R.R.* v. *United States,* 282 U. S. 740, 749-750 (1931).

constitutional federal question resulting from the train's continued operation.

We have been over the plaintiff's argument many, many times. The conclusion is that we do not find in the New Jersey order anything which constitutes, or can constitute, discrimination against interstate commerce or the persons engaged therein.

The petition will be dismissed.

To the Clerk:

Please file the foregoing opinion.

GOODRICH,
Circuit Judge.

May 13, 1957.

ENTRY IN DOCKET BOOK

OF

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Made upon issuance of foregoing decision.

May 15, 1957—Opinion filed 5-14-57 (Petition to set aside order of I.C.C. denied.) (Copy mailed to Attorney General.)

## Appendix "B".

### Opinion of the Interstate Commerce Commission.

# INTERSTATE COMMERCE COMMISSION

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No. 31566

NEW JERSEY & NEW YORK R. R. COMPANY'S OPERATION OF PASSENGER TRAIN IN NEW JERSEY

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Decided July 16, 1956.

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1. The operation in intrastate commerce by the New Jersey and New York Railroad Company of a passenger train operating from Jersey City, N. J., to Spring Valley, N. Y., required by an order of the Board of Utility Commissioners of the State of New Jersey, found not to be a "rate, fare, charge, classification, regulation, or practice" within the meaning of those terms as used in section 13(4) of the Interstate Commerce Act.

2. The foregoing train operation by the respondent found not shown to give or cause any undue or unreasonable preference or advantage to any particular person or locality in intrastate commerce, or to subject any particular person or locality in interstate commerce to any undue or unreasonable prejudice or disadvantage, prohibited by section 3(1) of the Act.

3. Order entered discontinuing the investigation.

*Richard Swan Buell* and *Andrew M. Calamari* for respondent.

*Grover C. Richman, Jr., Benedict W. Harrington, Henry B. Freefield, John R. Sailer, Austin L. Roberts, Jr.,* and *Sam A. Colarusso* for protestants.

*Appendix "B":*

REPORT OF THE COMMISSION

BY THE COMMISSION:

The respondent filed exceptions to the report proposed by the examiner, and one of the protestants replied. Requested findings and exceptions not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In response to a petition filed February 9, 1954, on behalf of the trustee of the New Jersey and New York Railroad Company[1], hereinafter called the respondent, by our order of June 21, 1954, we instituted this investigation under section 13 of the Interstate Commerce Act, and directed that a hearing be held for the purpose of receiving evidence from the respondent and any other persons interested, to determine whether the operation by the respondent in intrastate commerce in New Jersey of its train No. 613[2] from Jersey City, N. J., to Spring Valley, N. Y., causes, or will cause, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and to determine what order, or orders, shall be entered to remove the unlawful advantage, preference, or discrimination, if any, that may be found to exist. The order made the petitioner a respondent, and copies of the order of investigation and

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[1] Horace Banta, trustee, is the successor to Peter Duryea who was the trustee when this proceeding was initiated.

[2] This train has since been renumbered 601, but as it has been referred to as No. 613 throughout the prior litigation, and to avoid confusion, the same designation will be continued generally throughout this report.

notice of hearing were served upon the respondent and the State of New Jersey.

The request for the investigation was opposed by the Board of Utility Commissioners of the State of New Jersey, hereinafter called the New Jersey Board, on the ground that the matter is not within our jurisdiction. The Board therefore sought dismissal for want of jurisdiction or denial of the petition, or, in the alternative, that the petition be set for hearing. The petition for the investigation was originally denied, but upon the respondent's petition for reconsideration, we vacated the denial order and instituted the investigation. At the hearing the position of the New Jersey Board in opposition to the relief sought was supported by the National Association of Railroad and Utilities Commissioners, hereinafter called the Association, and by the Brotherhood of Railroad Trainmen, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Locomotive Engineers. These opposing interests will be referred to collectively as the protestants.

The Association is a voluntary organization of the members of the railroad and public utility regulatory commissions and boards of the various States, which are charged by State laws with the duty of regulating the intrastate passenger-train service of the railroads operating within their respective States. Its interest in this proceeding is to prevent the impairment of State jurisdiction over intrastate passenger-train service which would result from our assumption of jurisdiction over such service. The interest of the unions is to protect their members now employed by the respondent from loss of their employment because of the threatened curtailment of respondent's train service.

Discontinuance of passenger Train 613 was first proposed by the respondent in 1950. Its application for per-

mission to discontinue was denied by the New Jersey Board on November 9, 1950, and after rehearing the denial was affirmed by the Board on May 17, 1951. Upon reapplication and further hearing, the Board again denied the application on March 5, 1952, finding that the curtailed service would not be adequate and proper, and that public convenience and necessity required the continuance of the train. On appeal, the Appellate Division of the Superior Court of New Jersey on November 18, 1952, affirmed the order of the Board. *In re New Jersey & N. Y. R. Co.*, 23 N. J. Super. 1; 92 A. 2d 515. The judgment of the lower court was affirmed by the Supreme Court of New Jersey on March 30, 1953. 12 N. J. 281; 96A. 2d 526. A further appeal by the respondent was taken to the Supreme Court of the United States, which on November 9, 1953 dismissed the appeal for want of a substantial Federal question. *New Jersey & N. Y. R. Co.* v. *Public Utility Comm'rs.*, 346 U. S. 868. Thereafter, the petition for this investigation was filed with us.

The respondent operates a line of railway between Jersey City, N. J., and Thiells, N. Y., a total distance of approximately 33 miles, of which about 10 miles are used under trackage agreement with the Erie[3]. Of the total mileage, approximately 25 miles are in the State of New Jersey and the remainder in the State of New York. Its passenger operation extends only to Woodbine, N. Y., where its passenger-train yard is located, about a mile north or west of the passenger station at Spring Valley. The total distance from Jersey City to Woodbine is about 31 miles, of which approximately 6 miles is in the State of New York.

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[3] Short term used throughout this report for the Erie Railroad Company. The mileage operated under trackage agreement is in two segments, one between Jersey City and New Jersey & New York Junction, N. J., 7.5 miles, and the other between Nanuet Junction, N. Y., and Spring Valley, 2.5 miles.

The respondent is controlled by the Erie through ownership of more than 80 percent of its capital stock. It has been in reorganization pursuant to section 77 of the Bankruptcy Act since June 30, 1938. On November 2, 1953, we approved a plan of reorganization under which the Erie would acquire the respondent's properties. *New Jersey & N. Y. R. Co. Reorganization*, 290 I.C.C. 9, 119. On October 11, 1954, the New Jersey District Court disapproved the plan because of changes and developments which occurred since the plan was certified, and referred it back to us. Amended plans of reorganization were made the subject of a further hearing, and an examiner has issued a proposed report recommending certain modifications in the plan of reorganization heretofore approved.

On the evidence before us, the conclusion is warranted that the operation of Train 613 results in an out-of-pocket loss to the respondent in excess of $30,000 a year, which contributes to the substantial recurring passenger deficits, and to the net losses from respondent's operations as a whole shown to have been more than $300,000 annually in 1952 and 1953, with a substantially greater loss indicated for 1954.

It is the position of the respondent that the order of the New Jersey Board causes undue, unreasonable, and unjust discrimination against interstate commerce, in that (1) it prevents the passenger traffic from contributing its fair share of the revenues required to meet respondent's costs of maintaining and operating its property devoted to transportation service, both interstate and intrastate; (2) it causes a diversion of respondent's revenues from all sources, and particularly from interstate freight traffic, to supply the operating expenses of No. 613, to the detriment of such freight traffic and all traffic; and (3) it hampers the successful reorganization of respondent as a carrier in interstate commerce rendering important service as a part of the national transportation system. The

respondent further contends that the Board, by improperly relying on persons and localities in interstate commerce to justify the continuance of an unnecessary passenger service, prevented its discontinuance for the benefit of persons and localities in intrastate commerce, and consequently causes undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other. In addition to the reorganization proceeding, the respondent refers to other recent proceedings before us initiated by it to secure the maximum revenues possible from its passenger and freight services.[4]

The protestants are united in contending that we are without jurisdiction in the matter and urge dismissal of the proceeding for want of jurisdiction. It is the position of the respondent that the order of the New Jersey Board is in violation of the broad language of paragraphs 3 and 4 of section 13 of the Act and that, in entering our order directing the investigation, we have determined that we have the necessary jurisdiction. On exceptions, respondent contends that the examiner erred in considering the question of jurisdiction. The mere entry of the order of investigation indicates no final determination by us of the jurisdictional question, and the examiner was not pre-

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[4] As to increases in interstate passenger fares: *Commutation Fares in C.F.A. and T.L. Territories*, 284 I.C.C. 129 (1952), and on reconsideration, 288 I.C.C. 117 (1953); *Commutation Fares between New York, New Jersey and Pennsylvania I.C.C.* (No. 31663), an investigation into the lawfulness of certain of respondent's increased interstate commutation fares; as to increases in intrastate fares; *New Jersey Commutation Fares*, 293 I.C.C. 562 (1954), a 13th section investigation of intrastate commutation fares, reopened and further heard with No. 31663; and as to freight divisions: *New Jersey & N. Y. R. Co.* v. *Erie R. Co.*, 288 I.C.C. 219 (1953), and on reconsideration, 292 I.C.C. 479 (1954).

cluded from considering that issue. Before we may lawfully enter any order respecting the matters here under investigation, we must determine that we possess the requisite authority.

The contentions of the protestants on the jurisdictional issue are based on the following points: (1) We are without jurisdiction over the discontinuance of passenger-train service even when furnished in interstate commerce; (2) section 13 does not confer upon us jurisdiction to investigate the result of the operation of a passenger train required by an order of a State commission; (3) the legislative history of the Transportation Act of 1920 makes plain the intent of Congress not to disturb exclusive State authority over passenger-train discontinuances; (4) Congress has declined to enact legislation extending section 13 powers to include jurisdiction over passenger-train service; and (5) the decision of the United States Supreme Court, relied upon by the respondent, is not relevant to the issues in this proceeding.

This Commission is an agency of limited authority, and in the exercise of the powers delegated to us by Congress we may not extend those powers beyond the express enactment or fairly implied inferences. The delegation of important powers may not be read into the law by implication. *Thompson* v. *United States,* 246 U. S. 457; *United States* v. *Pennsylvania R. Co.,* 242 U. S. 208; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. Ry. Co.,* 167 U. S. 479. Particular pronouncements of disfavor by reason of inroads made upon State authority by implication were made in *Kelly* v. *Washington,* 302 U. S. 1, *Palmer* v. *Massachusetts,* 308 U. S. 79, and *Southern Pac. Co.* v. *Arizona,* 325 U. S. 761. An unmistakable Congressional intent to protect the States from unnecessary encroachment is indicated by the proviso to section 1 (17)(a) of the Act, "That nothing in this part shall impair or affect the right of a State, in the exercise of its police

power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this part."

So far as our jurisdiction over interstate passenger transportation is concerned, the provisions of part I, except as to service matters, parallel those respecting freight transportation. Section 1, paragraphs 10 to 17, and 21, are generally restricted to car service in the transportation of property.[5] The addition, in 1920, of the authority to regulate the supply of trains is not specifically restricted to trains used in the transportation of property, but when the question came before us in *Wisconsin Railroad Comm.* v. *Chicago & N. W. Ry. Co.*, 87 I.C.C. 195 (1924), we felt impelled to hold that the additional words related only to the transportation of property, and did not confer upon us jurisdiction to determine whether the discontinuance of certain passenger trains resulted in inadequate service or to require the restoration, in whole or in part, of the service discontinued. See also *Los Angeles Passenger Terminal Cases*, 100 I.C.C. 421, 142 I.C.C. 489 (1925-1928). Our powers under section 1(18) to authorize or prevent the abandonment of "all or any portion of a line of railroad, or the operation thereof", do not extend to the mere curtailment or partial discontinuance of service. *Kansas City Southern Ry Co. Application*, 94 I.C.C. 691; *Palmer* v. *Massachusetts, supra; New York Central R. Co. Abandonment*, 254 I.C.C. 745, 765. On the other hand, we have the power to authorize the curtailment of passenger service as

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[5] Some of the powers conferred by these sections do not appear to be so restricted, such as those involving the joint use of terminals and the directions for preference to priority in transportation, embargoes, or movement of traffic in times of emergency. *Atchison, T. & S. F. Ry. Co.* v. *LaPrado*, 2 Fed. Supp. 855; *In the matter of Service Order No. 85*, 256 I.C.C. 523; *Heflin* v. *Baltimore & R. Co.*, 278 I.C.C. 737.

part of a complete plan of reorganization of an insolvent road. Section 77 of the Bankruptcy Act (11 U.S.C. 205); *Palmer* v. *Massachusetts, supra; New York, N. H. & H. R. Co. Reorganization,* 244 I.C.C. 239, 262-266. We have assumed authority also over matters of preference and prejudice in passenger service under the provisions of section 3 of the Act., *Heflin* v. *Baltimore & O. R. Co.,* 278 I.C.C. 737; *Barton* v. *Baltimore & O. R. Co.,* 280 I.C.C. 9.

The provisions of sections 13(3) and (4), on which the respondent relies, apply to investigations under part I of "any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State." Obviously, this is not an investigation of a rate, fare, charge, or classification, and there is no contention that it is. It is the respondent's position that its action in seeking to make effective a new schedule of trains decreasing their number is a regulation of its train service, and that, by refusing to permit the change, the State Board is imposing the existing schedule or "regulation" upon it, thus casting an undue and unreasonable burden on interstate commerce which this Commission has authority to remove under section 13. The respondent contends that what is in issue is the State's refusal to permit the establishment of a revised schedule of passenger trains, just as in intrastate fare cases there is in issue the State's refusal to permit a revised schedule of passenger fares. Our jurisdiction over the fares rests upon a specific provision in the statute. The term "regulation" is one of a series of terms used throughout the Act in varying combination with rates, fares, charges, classifications, practices, and rules that are, or are required to be, established, maintained, and applied by the carriers in connection with traffic transported. The running of a particular passenger train with a published statement of the points served and the time of arrival and departure is subject to transporta-

tion regulations, but is not itself a regulation within the meaning of that term as used in the Act.

The term "practice", like "regulation", is one of a series of terms used in section 13 and other sections in placing the duty upon the carrier to establish, observe and enforce just, reasonable, and otherwise lawful rates fares, charges, classifications, regulations, practices, and rules in connection with traffic transported. In *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291, 299-300 (1928) in cautioning against a broad construction of the word "practice", the Supreme Court said:

> "The word 'practice' considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it."

In accord with that rule of construction, it follows that the word "practice" as used in Section 13 must be interpreted as applying only to acts or things pertaining to rates, fares, charges, classifications, or regulations as those terms are used in this section of the act. The operation of a passenger train is not such a practice.

The respondent places great reliance upon certain language used in *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341 (1951); which concerned a suit by a railroad to enjoin an order of the Alabama State Commission denying the road's application for permission to discontinue the operation of two local intrastate passenger trains. Instead of pursuing its right of appeal to the State Courts, the railroad filed a complaint in the Federal District Court on constitutional grounds. A three-

judge District Court permanently enjoined the State Commission's order. *Southern Ry. Co.* v. *Alabama Public Service Comm.*, 91 F. Supp. 980. Upon appeal, the Supreme Court reversed the lower court and held that, assuming the Court below had jurisdiction, it should not have exercised it as a matter of sound equitable discretion because adequate review was available in the State Courts and because predominantly local factors were involved. The statement of the Supreme Court relied upon by the respondent appears in footnote 9 on page 346 of the decision. The discussion, beginning at page 345, leading to the footnote in question is reproduced in full below:

> "In assessing the propriety of equitable relief, a review of the regulatory problem involved in this case is appropriate.
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> "Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 U.S.C. §§1, *et seq.* But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the States of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority. *Minnesota Rate Cases*, 230 U. S. 352 (1913). And Congress has since provided:
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> > 'That nothing in [the Interstate Commerce Act] shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the [Interstate Commerce Commission]." 49 U.S.C. § 1(17)(a).
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> "This Court has held that regulation of intrastate railroad service is 'primarily the concern of the state.'

*North Carolina* v. *United States*, 325 U. S. 507, 511 (1945) (rates); *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939) (discontinuance of local service).

"State and federal regulatory agencies have expressed concern over the chronic deficit arising out of passenger train operations as a threat to the financial security of the American railroads and have recommended drastic action to minimize the deficit, including the discontinuance of unpatronized and unprofitable service.[8] However, our concern in this case is limited to the propriety of a federal court injunction enjoining enforcement of a state regulatory order."[9]

The three marginal notes referred to in the text of the foregoing discussion read as follows:

"Footnote 7: Appellee seeks to discontinue only two of several passenger trains serving the same communities. This is a proposed partial discontinuance and not an abandonment over which the Interstate Commerce Commission is given exclusive authority under 49 U.S.C. §§ 1(18-20). *Colorado* v. *United States*, 271 U. S. 153 (1926). The I.C.C. has held that it has no authority under 49 U.S.C. §§ 1(18-20) to authorize a partial discontinuance, as such of intrastate passenger service. *Kansas City Southern R. Co.*, 94 I.C.C. 691 (1925); *New York Central R. Co.*, 254 I.C.C. 745, 765 (1944).

"Footnote 8: See 64th Annual Report, Interstate Commerce Commission (1950) 5-6; 63rd Annual Report, Interstate Commerce Commission (1949) 4-5; *Increased Freight Rates*, 1948, 276 I.C.C. 9, 32-40 (1949); Proceedings, 61st Annual Convention, National Association of Railroad and Utilities Commissioners (1949) 378-382, 410-414.

"Footnote 9: As the jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 13(4) has not been invoked for decision as to whether the continuance of this intrastate service constitutes an undue discrimination against interstate commerce; we cannot, in this proceeding, consider any impact the order of the Alabama Public Service Commission might have on interstate commerce." *Western & Atlantic R. Co.* v. *Georgia Pub. Serv. Comm'n*, 267 U. S. 493 (1925), and cases cited therein."

The respondent argues that this decision constitutes a holding by the Supreme Court that we have jurisdiction to act under Section 13 in matters like that presented in the respondent's petition, which were not before the courts when its appeal from the Board's order was dismissed by the State Courts and finally by the United States Supreme Court. No question involving our jurisdiction was before the Court in *Alabama Public Service Commission* v. *Southern Ry. Co., supra.* The references of the Court to our jurisdiction related to orderly procedure and was not a decision on a question raised as to our jurisdiction. The lower court was reversed, not because it lacked jurisdiction, but because its discretion was exercised without "scrupulous regard for the rightful independence of State governments which should at all times actuate the federal courts". The case cited and the others referred to in footnote 9 to the Court's decision are directed to the rule that in cases involving matters within our jurisdiction, preliminary resort must be had to us for determination of the administrative questions before the judicial powers of the courts may be invoked.

As recently as 1952 (66th Annual Report, I.C.C., p. 46), in reviewing the passenger-train deficit, we reminded Congress of the long-standing jurisdictional situation in the following words:

> "While we have the power to authorize the complete abandonment of a line of railroad and have been called upon to exercise such power, we cannot, under the present act, authorize the carriers merely to curtail service on a line. This power, where it exists at all, rests with the State regulatory commissions."

Subsequently, a bill[6] introduced in the Congress to amend the act by extending our authority so as to give us power to order the discontinuance of railroad freight, passenger, or station service in intrastate commerce when found unjustly discriminatory against interstate commerce, failed of enactment.

It is urged also by the respondent that the order of the New Jersey Board causes unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other. Here again, the provisions of Section 13 are limited to preference and prejudice caused by rates, fares, charges, classifications, regulations, or practices, which terms, as herein found, have no application to passenger-train service.

The respondent suggests further that the broad powers of the Commission under Section 3 of the Act require the affirmative action desired in the matter presented. Prior to the enactment of Section 13, undue preference of intrastate traffic was dealt with under Section 3. *Railroad Comm. of Louisiana* v. *St. Louis S. W. Ry. Co.*, 23 I.C.C. 31; *Houston, E. & W. T. Ry. Co.* v. *United States*, 234 U S. 342, but not since then. Matters of preference and prejudice in interstate passenger service under this section have been considered by us as above noted; but we have not had occasion to consider such matters in intrastate-passenger service.

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[6] S. 281, 83rd Congress.

*Appendix "B".*

After pointing to the relatively small number of intrastate passengers who use Train 613, the respondent contends that "if interstate traffic is required to be continued to its own detriment merely for the purpose of benefiting intrastate passengers, the result is an unreasonable preference or advantage to such passengers," and that the New Jersey Board, in taking advantage of the traffic density produced by interstate commerce to justify its requirement that an infrastate service be continued, unduly prefers intrastate passengers. The interstate passengers and localities served by the train would seem to be benefited by the Board's order. In so far as the respondent's theory rests upon the threat to interstate passengers and shippers of increased rates and fares required by the dissipation of respondent's revenues by State-required running of alleged needless passenger trains, it goes beyond the purview of personal or local prejudice. In any event, there is upon this record no evidence upon which it could be found that intrastate passengers or localities are preferred and interstate passengers or localities are prejudiced.

We conclude that we have no authority to determine whether the operation by the respondent in intrastate commerce in New Jersey of its train No. 613 (renumbered 601) causes, or will cause, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

We further conclude that the operation of train No. 613 is not shown to give or cause any undue or unreasonable preference or advantage to any particular person or locality, or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage, prohibited by section 3(1) of the Act.

An order will be entered discontinuing this investigation.

Clarke, *Commissioner*, concurring-in-part:

I concur in the finding herein that the Commission has no authority under section 13 of the Act to determine whether the operation by respondent of the train in issue herein causes or will cause, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce. I am also of the opinion, however, that we have no jurisdiction to make a determination under section 3(1) of the Act.

Briefly, section 3(1) prohibits carriers from giving undue preference to, or subjecting to undue prejudice, any particular person, locality, or description of traffic. Section 1(2)(a) states, in part, that the provisions of part I of the Act shall not apply to the transportation of passengers wholly within one State. In *Houston, E. & W. T. Ry. Co.* v. *United States, supra,* (known as the *Shreveport* case), the Supreme Court, in concluding that the Commission was authorized under section 3(1) to require removal of undue preference and prejudice caused by intrastate rates lower than interstate rates for similar services, stated, at page 358, that the limitation in section 1(2)(a) did not apply in that case because "the question was * * * not simply one of transportation that was 'wholly within one state'."

The issue here developed by reason of the New Jersey Commission denying respondent authority to discontinue one passenger train "wholly within one state." With respect to such partial discontinuances of passenger service, the Supreme Court in *Palmer* v. *Massachusetts, supra,* stated at page 82:

> "The District Court assumed power to supplant the relevant authority of the state—an authority which, apart from the proceedings under § 77, has not been

conferred by Congress either upon the federal courts or the Interstate Commerce Commission."

nd, at pages 83 and 84, it stated:

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of statute. At best this is subtle business, calling for great wariness *lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.* Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

"To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority as a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and lively maintenance of local institutions *Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress.* Minnesota Rate

Cases, 230 U. S. 352; cf. Kelly v. Washington ex rel. Foss Co., 302 U. S. 1." (Italics added.)

I am of the opinion that the required continuance of intrastate passenger service here in issue is plainly a matter within the sole jurisdiction of the New Jersey Commission, and that in the absence of a "plain mandate of Congress" we should not attempt to assume jurisdiction, even for the purpose of finding that no violation of section 3(1) has been shown.

I am authorized to state that Commissioner Walrath joins in this expression.

Commissioners Freas and Minor concur in the result.

Chairman Arpaia and Commissioners Mitchell and McPherson did not participate in the disposition of this proceeding.

*Appendix "B".*

## ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 16th day of July, A. D. 1956.

No. 31566

NEW JERSEY & NEW YORK R. R. COMPANY'S OPERATION OF PASSENGER TRAIN IN NEW JERSEY

*It appearing*, That by order dated June 21, 1954, the Commission instituted an investigation, under section 13 of the Interstate Commerce Act, to determine whether the operation by the respondent in intrastate commerce in New Jersey of its train No. 613, renumbered 601, operating from Jersey City, N. J., to Spring Valley, N. Y., causes, or will cause, any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce;

*It further appearing*, That a full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

*It is ordered*, That this proceeding be, and it is hereby, discontinued.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

## Appendix "C".

### Text of the Statutes Involved.

**Title 49 U.S.C., § 3. Preferences; interchange of traffic; terminal facilities—Undue preferences or prejudices prohibited**

(1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * *

**Title 49, U.S.C., § 13. Complaints to and investigations by commission**

* * *

**Investigation involving State regulations; conference of State and interstate commissions**

(3) Whenever in any investigation under the provisions of this chapter, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, the commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The commission may confer with the authorities of any State having regulatory jurisdiction

over the class of persons and corporations subject to this chapter or chapter 12 of this title with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this chapter or chapter 12 of this title.

**Duty of Commission where State regulations result in discrimination**

(4) Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.